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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 511

EDWARD J. SIMONS, ET AL.,
Petitioners,

vs.

JERRY VINSON and A. P. CLARK, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

and in the alternative,

MOTION FOR LEAVE TO INTERVENE IN No. 18, ORIGINAL, OCTOBER TERM, 1922, STATE OF OKLAHOMA VS. STATE OF TEXAS (UNITED STATES, INTERVENER), 261 U.S. 340, AND No. 15, ORIGINAL, OCTOBER TERM, 1923, STATE OF OKLAHOMA VS. STATE OF TEXAS (UNITED STATES, INTERVENER), 265 U.S. 500.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit.

OPINION BELOW

There was no formal opinion of the District Court. Sufficient excerpt of the order of dismissal is found in the opinion of the Court of Appeals.

The opinion of the Court of Appeals for the Fifth Circuit, entered May 3, 1968, rehearing denied, June 17, 1968, is reported in 394 F.2d 732. The slip opinion is set out in Appendix A, at page A1.

JURISDICTION

The judgment of the court below (R. 138) was entered on May 3, 1968. A timely petition for rehearing was denied on June 17, 1968, Appendix B, p. A10.

The jurisdiction of this Court is invoked under 28 U.S. Code, § 1245 (1). The jurisdiction of the Circuit Court was invoked under 28 U.S. Code, § 1291.

QUESTIONS PRESENTED

1. Is the allegation of the existence of an accretion deemed admitted when not denied by a motion to dismiss for lack of jurisdiction?

2. Does a Texas riparian landowner whose property is separated from the property of the United States in Oklahoma by the Oklahoma-Texas boundary (the south bank of Red River), acquire property rights to a naturally and gradually formed accretion to that river bank?

3. Does the Department of Interior have valid power and authority to withhold an accretion to the south bank of Red River?

4. If an accretion exists to the south bank of Red River, does the local federal District Court have constitutional jurisdiction, superior to the doctrine of sovereign immunity to suit, to grant a Texas riparian landowner specific relief against: oil and gas lessees of the United States, their oil purchaser, and the Department of Interior?

5. Is the Department of Interior a properly named defendant?

6. In the alternative, if the local federal District Court be without jurisdiction, can the Supreme Court grant leave to a Texas riparian landowner to intervene in the case of *Oklahoma* v. *Texas, United States, Intervener,* for the purpose of filing an ancillary bill in equity the object of which is to enforce the boundary decrees of *Oklahoma* v. *Texas* against the United States, its officers, its oil lessees and their oil purchaser?

CONSTITUTION, TREATY, COURT DECREES, STATUTES, RULES, AND OTHER MATTER INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Boundary Treaty of 1819, 8 Stat. 252, Art. 3, between the United States and Spain, provides in pertinent part as follows:

> "Art. 3 * * * thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red river; then following the course of the Rio Roxo westward, to the degree of longitude, 100 West from London and 23 from Washington; then, crossing the said Red river, and running thence, by a line due north * * *."

Oklahoma v. *Texas,* the Interlocutory Decree of June 1, 1921, 256 U.S. 608, provides in pertinent part as follows:

> "It is ordered, adjudged, and decreed that, according to the Treaty of February 22, 1819 (8 Stat. at L. 252),

between the United States and Spain, as heretofore examined and construed by this court in the case of United States v. Texas, 162 U.S. 1, 40 L. ed. 867, 16 Sup. Ct. Re. 725, the decree in which is conclusive upon the parties to this cause, the true boundary between the state of Oklahoma and state of Texas, * * * is along the south bank of Red river. * * *"

Oklahoma v. *Texas,* the Partial Decree of March 12, 1923, 261 U.S. 340, provides in pertinent part as follows:

"It is ordered, adjudged, and decreed: 1. The boundary between the states of Oklahoma and Texas * * * is a part of the international boundary established by the Treaty of February 22, 1819, * * * and is on and along the south bank of that (Red) river as the same existed in 1821, when the treaty became effective, save as hereinafter stated. (8 Stat. at L. 252)

2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion, the boundary has followed the change. * * *

3. * * *

4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future * * *."

Oklahoma v. *Texas,* the Supplement to Partial Decree of June 5, 1922, of March 12, 1923, 261 U.S. 345, provides in pertinent part as follows:

"2. The several interveners, who, under patents or Indian allotments by the United States, own lands bordering on the north side of the river, are severally the owners of so much of the bed of the river as lies in front of their lands and north of the medial line of the river, except as is otherwise stated herein. * * *

4. The full title and ownership of so much of the bed of the river as lies south of its medial line are in the United States.

5. In the sense intended herein, the medial line of the river is a line drawn midway between the northerly and southerly banks of the river, commonly called cut banks, * * *

13. The allotments in severalty made of the following tracts, to or on behalf of the Indians named, respectively included and covered the right and title to the portions of the river bed between such tracts and the medial line of the river:

(Tract 22)

Ray Do-Yah * * *"

Oklahoma v. *Texas,* the Decree of June 9, 1924, 265 U.S. 500, provides in pertinent part as follows:

"REPORT OF THE BOUNDARY COMMISSIONERS.

* * *

The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank. The physical top of the cut bank, being very uneven in profile, cannot be a datum for locating the boundary line; but a gradient along the bank must be used for that purpose. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity. The boundary line has been determined accordingly.

* * *

The survey was begun April 26, 1923, and completed February 17, 1924. The location of the boundary, re-

ported herewith, is that position which existed on December 31, 1923.

* * *

It is further adjudged, ordered, and decreed that the line delineated and set forth in the report and on the maps accompanying the same, and referred to therein, be established and declared to be the true bounary between the states of Texas and Oklahoma along the part of the Red river designated in such report, subject, however, to such changes as may hereafter be wrong by the natural and gradual processes known as erosion and accretion, as specified in the second, third, and fourth paragraphs of the decree rendered herein March 12, 1923."

The Secretary of Interior is authorized to make oil and gas leases by the following Acts of Congress to specified *lands in Oklahoma,* hereafter called the *Red River Acts.*

Indian land, 25 U.S. Code § 396, Act of March 3, 1909, c. 263, 35 Stat. 783, provides in pertinent part as follows:

"All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; * * *."

Red River channel land, 30 U.S. Code § 230, Act of March 4, 1923, c. 249, § 1, 42 Stat. 1448, provides in pertinent part as follows:

"The Secretary of the Interior is authorized to adjust and determine the equitable claims of citizens of the United States, and domestic corporations to lands and oil and gas deposits belonging to the United States and situated south of the medial line of the main channel of Red River, Oklahoma, * * *."

Red River channel land, 30 U.S. Code § 234, Act of March 4, 1923, c. 248, § 5, 42 Stat. 1449, provides in pertinent part as follows:

> "* * * After the adjudication and disposition of all applications under said sections 230-236 any lands and deposits remaining unappropriated and undisposed of shall, after date fixed by order of the Secretary of the Interior, be disposed of in accordance with the provisions of sections * * *."

Red River channel land, 43 U.S. Code § 209, Act of June 22, 1948, c. 605, § 1, 62 Stat. 576, provides in pertinent part as follows:

> "The public-land laws of the United States be, and the same are, extended to the public lands in that part of the Red River between the medial line and the south bank of the river, in Oklahoma, * * *."

Red River channel land, 43 U.S. Code § 210, Act of June 22, 1948, c. 605, § 2, 62 Stat. 576, provides in pertinent part as follows:

> "The Secretary of the Interior is authorized and directed to recognize equitable claims to such lands based on settlement made prior to January 1, 1934, * * *."

Red River channel land, Act of June 22, 1948, c. 605, § 3, 62 Stat. 576, provides in pertinent part as follows:

> "Except as to existing valid rights, the Act of March 4, 1923 (42 Stat. 1448) is hereby repealed."

By Pub. L. 87-748, § 1(a), October 5, 1962, 76 Stat. 744, 28 U.S. Code § 1361, Congress extended mandamus jurisdiction, theretofore existing only in the District of Columbia Federal Courts to all Federal Courts. The act provides:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an

officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The background and history is found in Vol. 2, 1962, U.S. Code Cong. and Admr. News, p. 2787, the pertinent part of which provides:

"* * * As stated in the House report, the bill does not define the term 'agency', but the committee agrees that it should be taken to mean any department, * * * or bureau of the United States * * *."

Rule 8(d) of the F.R.C.P. is deemed material to this case, the pertinent part of which provides:

"(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. * * *."

The oil and gas leases from the United States to the respondent lessees contain the following pertinent provisions:

"[R. 101-113] Sec. 1 (b) Boundary Lines—Because of possible changes in the Texas-Oklahoma boundary line and the medial line of Red river, as established by the Supreme Court of the United States on June 9, 1924, (265 U.S. 500), in case either or both of said boundary lines affects the lands leased hereunder, it is understood that the area of the lease may be diminished by reason of a shift to north-ward of the Texas-Oklahoma line, due to erosion or accretion and that in case of such shift to the south-ward, the area of this lease will not be enlarged; * * *."

"[R. 114-115] * * * subject to variation arising from changes in the position of the medial line and of the south bank of the river since December 31, 1923."

"[R. 115] * * * all accreted lands thereto in riverbed."

STATEMENT OF THE CASE

This lawsuit is a dispute over an alleged accretion to the south bank of Red River. It is located in the "Big Bend Area" as that locality was known in the original litigation.

Maps, inherent to an understanding of the facts, are found as follows:

Map No. 1: Cadastral Map of the Big Bend Area, referred to in 265 U.S. at page 502, will be found in the Supreme Court file of *Oklahoma* v. *Texas*. Reduced copy will be found in 44 S.Ct. 577, 68 L. Ed. 1142.

Map No. 2: Cadastral Map of the oil field region, in two sheets, Nos. 1 and 2, referred to in 265 U.S. at page 503, will be found in the Supreme Court file of *Oklahoma* v. *Texas*. Reduced copy will be found in 44 S.Ct. 578, 579, 69 L.Ed. 938-939 and 940-941.

Petitioners' maps, Exhibits A, B, and C, attached to the complaint, will be found in Appendix C—Maps.

The facts are simple. Petitioners allege that (1) they are Texas riparian landowners on Red River, the Oklahoma-Texas boundary to which (2) an accretion has taken place. [R. p. 11, § 5; R. p. 14, § 8; R. p. 19, § 13; R. p. 21, § 17]

By their complaint (R. p. 5), their tendered amendment (R. p. 112), and their proffered position (R. pp. 167, 168), before the Court of Appeals, petitioners request, *subject to the boundary decrees*, mandatory relief against the Department of Interior to compel the officers of that department to "quit claiming the accretion", possessory and injunctive relief against the oil and gas lessees of the United States, and a money judgment for conversion of oil against the lessees and their oil purchaser.

To the complaint the United States, the lessees and the oil purchaser filed motions (R. pp. 32, 94, 97) to dismiss for lack of jurisdiction. These motions called to the trial court's attention that the action was in essence against the United States, that it had not consented to suit and hence was immune to suit. The motions of the lessees and oil purchaser asserted the United States was an indispensable party and by virtue of its lack of consent to suit the action could not be maintained.

The motions also suggested that the official defendants, as named, could not be sued.

Two affidavits were submitted which affirmed that the oil lessees were in possession under their federal leases producing oil and that the oil purchaser was paying the royalty to the United States. These affidavits were not disputed.

After the motions were filed the petitioners moved (R. p. 103) the court to determine and settle how the court desired to hear proofs for and against the motions to dismiss.

The learned trial court held a pretrial conference. Without further proceedings the trial court ordered the case dismissed without prejudice for lack of jurisdiction.

The Court of Appeals has affirmed, one Justice dissenting.

Petitioners request certiorari and in the alternative, request this Honorable Court for leave to Intervene to file an Ancillary Bill in Equity to obtain enforcement of the boundary decrees from this Court.

The jurisdiction of the District Court was invoked under the Constitution, Amendment V, 28 U.S. Code § 1331,

28 U.S. Code § 1361. Petitioners asserted a Federal Common Law jurisdiction, ancillarily vested in the District Court to enforce the boundary decrees of this Court.

REASONS FOR GRANTING THE WRIT

An unresolved question of sovereign immunity to suit raised by the Department of Interior in this case has not, but should be, settled by this Court.

In the lower Courts the Department has successfully used the doctrine of sovereign immunity to suit to thwart the enforcement of the boundary decrees of this Court, rendered in *Oklahoma* v. *Texas*.

Petitioners' property rights in an accretion, acquired by the law of alluvion incorporated in and made a part of the decree, has been confiscated by the Secretary's successful use of the doctrine of sovereign immunity to suit.

Thus, sovereign immunity to suit has rendered impotent the Constitution, the boundary Treaty and decrees of this Court.

The boundary of Oklahoma and Texas along Red River divides countless tracts of land owned by the United States [for itself or as trustee for Indians] from land of Texas patented landowners. The question presented has more than passing public importance.

Moreover, the question presented is "fundamental to the further conduct of the case". On numerous occasions this has called forth the Court's power of supervision.

ARGUMENT

Under Rule 8(d), F.R.C.P., *supra*, p. 8, for purposes of testing jurisdiction, allegations not denied are "deemed" admitted.

This Court applied Rule 8(d) in *Land* v. *Dollar*, when it said [330 U.S. at 735] "The allegations of the complaint, if proved, would establish * * *" and again when it said [p. 737] "precisely the same will be true here, if we assume the allegations of the complaint are proved.", and finally when it said [p. 738] "That is to say, if the allegations of the petition are true * * *".

In *Mine Safety Appliance Co.* v. *Forrestal*, this Court said [326 U.S. at 374] "* * * if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellants' allegations * * * are true * * *".

The Court of Appeals refused to follow Rule 8(d). This was error. Coleman, Circuit Judge, dissenting (Slip opinion, p. 9, *infra*, App. A, p. A8), did not commit error for he said, "Assuming the allegations of the complaint to be true, as we must do in passing on the validity of the dismissal for want of jurisdiction * * *".

The refusal of the Court of Appeals to follow Rule 8(d) sanctions the Secretary's confiscation of the petitioners' property. Under a constitutional adversary system of justice, when the system provides means that block procedural processes to show invasion of the constitution, the system itself has failed.

The allegation of the existence of the accretion, if proved, would invoke the boundary Treaty, *supra*, p. 3, and the boundary decrees, *supra*, pp. 3-6, of this Court. The boundary follows accretion. Thus, it is Texas land, the property of the petitioners.[1]

1. The law of alluvion effects a transfer of title and right of possession from the United States to the Texas riparian landowner. *Oklahoma* v. *Texas*, 260 U.S. at 636, Decrees, 261 U.S. 340, 265 U.S. 500. See also, *New Orleans* v. *United States*, 10 Pet. at 717; *County of St. Clair* v. *Lovington*, 23 Wall. at 68; *Jefferies* v. *E. Omaha Land Co.*, 134 U.S. at 189; *Nebraska* v. *Iowa*, 143 U.S. at 361, 367, 370; *Missouri* v. *Nebraska*, 196 U.S. at 23; *Washington* v. *Oregon*, 211 U.S. at 120; *Arkansas* v. *Tennessee*, 246 U.S. at 173, and *Arkansas* v. *Mississippi*, 250 U.S. at 45.

As a general rule, the District Court would have authority to consider questions of jurisdiction on the basis of affidavits, as well as the pleadings. But this is the type of case where the question of jurisdiction is dependent on decision of the merits. Such type of case is an exception to the general rule. *Land* v. *Dollar*, 330 U.S. at 735; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 690; *West Coast* v. *McKay*, D.C. Cir., 213 F.2d at 590-596; *Schramm* v. *Oakes*, 10th Cir., 352 F.2d at 149; *Williams* v. *M.M.M. Co.*, D.C. Cal., 14 F.R.D. at 8; *Shaffer* v. *Coty*, D.C. Cal., 183 F.Supp. 665.

There remains a determination of the scope of delegated power and authority of the Secretary under the Red River Acts.

That has also been determined by this Court, for in *Oklahoma* v. *Texas*, 265 U.S. 495, this Court said:

> "Even after the release [of the receiver], the Secretary's authority will extend to such lands only as may lie between the interstate boundary and the medial line of the river, as the two are settled by this court."

It is a shifting boundary. A waterline, which is a shifting line, and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object, such as a street or a wall. *Jefferies* v. *E. Omaha Land Co.*, 134 U.S. at 196.

The law of alluvion effects change of title and possession, little by little and day by day, as the never ending processes of nature perform. Such has been "the established law of civilized nations since the Institutes of Gaius were written, nearly 1800 years ago." Per Cureton, C.J., in *Manry* v. *Robison*, 122 Tex. 210, 56 S.W.2d 443-444.

Uniformly, our boundary Treaties, using rivers as the boundary, are judicially construed to include the private or general law of alluvion, *Oklahoma* v. *Texas*, 260 U.S. at 634; *Arkansas* v. *Tennessee*, 246 U.S. at 173; *Cissna* v. *Tennessee*, 246 U.S. at 296.

The law of alluvion, as a part of the boundary Treaty, is federal law. *Cissna* v. *Tennessee*, 246 U.S. at 296.

The United States owns a possibility of a riparian reverter. The boundary decree settles that. If the accretion erodes, title and possession return to the United States.

The Red River Acts grant the Secretary a limited power. His powers are limited to *channel land in Oklahoma.*[2]

No implied power exists to "acquire" *a Texas accretion* from his expressed power to "manage" and "dispose" of *river channel land in Oklahoma.*[3] An implied power cannot exist when expressly prohibited by the expressed power. *McCullough* v. *Maryland,* 4 Wh. 421.

Congress disposed of its power over such Texas accretion by making the boundary Treaty. Since Congress has not recalled power over the Texas accretion by eminent domain, the Secretary has no power over it. The Secretary's power can rise no higher than the power of Congress.

Concisely stated, the Secretary is not "governing" or "performing sovereign powers" when he crosses the Oklahoma-Texas state line. He cannot make the boundary

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2. *"Public land"* as used in the Red River Acts is a "term uniformly regarded as not including lands to which rights have attached and become vested through full compliance with an applicable land law." *Payne* v. *Central Pac. R. Co.,* 255 U.S. at 237.

The law of alluvion is such a land law.

Compare *Pettibone* v. *Cook Co. Minn.,* 8th Cir., 120 F.2d 850; *Bigelow* v. *Herrink,* (Iowa) 200 Iowa 830, 205 N.W. 531, and *Borax* v. *Los Angeles,* 296 U.S. 10.

The transfer of the title by the law of alluvion, is like the transfer of title by a patent, and "all the authority of control of the executive department over the land, and over the title" "passes away". "The functions of that department necessarily cease when the title has passed from the government." *Noble* v. *Union River Logging R. Co.,* 147 U.S. at 176. "Whenever this takes place [that is, when a patent is duly executed], the land has ceased to be the land of the government, or to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away." *Noble, supra,* p. 177.

3. When making the leases the Secretary seemed to recognize the limitations of his authority. He protected his limited authority with sufficient language in the leases. For this language see p. 8, *supra.*

Treaty and boundary decrees *acts of futility*. He cannot re-litigate the boundary.

The United States was a party to the boundary Treaty and a party to the action from which the boundary decrees were rendered. The limitations of these laws bind the United States and hence bind the Secretary.

This case does not represent authorized performance of federal law with a resultant tort under the general law. To control the Secretary will not control his performance of soverign duties for the purpose of halting an invasion of a right under general law. The relief, if granted, will not prevent him from administering the United States public land in the *channel of Red River in Oklahoma*.

When the Secretary violated the Treaty, the decrees and the Red River Acts, his action was that of an individual. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 689. His acts do not bind the United States. *Id.* To control the Secretary will not control the United States. *Id.* Relief can be complete without the presence of the United States. The United States is not an indispensable party. *Lane* v. *Watts*, 234 U.S. at 540. Moreover, the United States will not be bound. *Land* v. *Dollar*, 330 U.S. at 739. The decree will not be *res judicata* against the sovereign. *Id.* This is a suit to restrain the Secretary from an illegal act under color of his office. *Lane* v. *Watts*, 234 U.S. at 540.

By rejecting the admitted allegations of the existence of the accretion, the Court of Appeals converted violation of four federal laws into valid action. The four federal laws violated are (1) the Red River Acts, (2) the boundary decrees, (3) the boundary Treaty, and (4) Fifth Amendment. It is the violation of these four federal laws that

distinguishes this case from *Dugan* v. *Rank*, 372 U.S. 609 and *Malone* v. *Bowdoin*, 369 U.S. 643. *Dugan* and *Malone* represent performance of federal law with resultant violation of general law. These two cases were used by the Court of Appeals to support its position. They do not apply here.

The Fifth Amendment commands that the Secretary stop his invasion of petitioners' federal rights. *United States* v. *Lee*, 106 U.S. 196; *Land* v. *Dollar*, 330 U.S. 731; *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165. In *Noble, supra*, the court said that when the Secretary of Interior threatened to invade a vested property right of the citizen his "attempt to deprive the plaintiff of its property" was "without due process of law." 147 U.S. at 176.

Violation of federal law precludes petitioners from obtaining due process under the Tucker Act and the Tort Claims Act. There are no applicable special relief acts.

Because the tort is founded in federal law, the Court of Claims has no jurisdiction. Congress has not authorized the Secretary to purchase the accretion nor made an appropriation to pay for it. The Secretary claims it on behalf of the government as its property in a proprietary sense. *Hooe* v. *United States*, 218 U.S. at 335; *United States* v. *Goltra*, 312 U.S. at 208; *United States* v. *North American Transp. & Trading Co.*, 253 U.S. at 333, 334; *United States* v. *Lynah*, 188 U.S. at 464.

The Tort Claims Act does not authorize compensation for future damages of a continuing trespass to land arising from violation of federal law.

Constitutional jurisdiction, superior to the doctrine of sovereign immunity, exists for all forms of specific relief.

This Court said in *Malone* v. *Bowdoin*, 269 U.S. at 647, 648, that *United States* v. *Lee*, 106 U.S. 196, was "a specific application of the constitutional exception to the doctrine of sovereign immunity" and had continuing validity "where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation."

This Court said in *Land* v. *Dollar*, 330 U.S. at 738, "But public officials may become tort-feasors by exceeding the limits of their authority." The citizen "is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld".

"The constitutional command is higher than the doctrine of sovereign immunity." If not, "the treaty, the Supreme Court decrees, and the Constitution itself are rendered impotent." Per Coleman, Circuit Judge, dissenting opinion (Slip opinion p. 10, *infra*, App. A, p. A9).

U. S. v. *Lee*, 106 U.S. 196 and *Land* v. *Dollar*, 330 U.S. 731 control this case, not *Dugan* v. *Rank*, *supra*, and *Malone* v. *Bowdoin*, *supra*.

In *Clackamas Co. Oregon* v. *McKay*,[4] D.C. Cir., 219 F.2d 479, the federal court of the District of Columbia used mandamus to compel the Secretary of Agriculture to perform the decree of the federal court of Oregon. The United States was plaintiff. See pp. 485, 487, 488, 494 and

4. Certiorari granted, dismissed as moot. Pending appeal administrators performed the decree. See *Lafferty* v. *Humphrey*, D.C. Cir., 248 F.2d 82. In *Clackamas*, as here, the Secretary claimed the right to administer land and determine whether it was revested railroad land, asserting he was authorized by Congress. But, that very matter was decided by the Oregon federal court. Here, the Secretary claims this accretion as United States public land. But, as in *Clackamas* this Court has decided an accretion is in Texas and belongs to the Texas riparian landowner.

496 of the opinion. Sovereign immunity to suit was rejected.

The following cases support jurisdiction and mandatory type relief against the Secretary of Interior. *Noble* v. *Union River Logging R. Co.*, 147 U.S. 164; *Lane* v. *Watts*, 234 U.S. 525; *Payne* v. *Central Pac. R. Co.*, 255 U.S. 228; *Santa Fe* v. *Fall*, 259 U.S. 197. Compare *Philadelphia Co.* v. *Stimson*, 223 U.S. 605. In these cases "claimed" "public land" was recovered. Titles were quieted. Sovereign immunity was rejected. The United States was not an indispensable party.

The decision of the Court of Appeals is contrary to these cases.

If jurisdiction otherwise exists, 28 U.S. Code § 1361, *supra*, p. 7, permits a federal agency to be sued as "department", "bureau" or "commissioner". Vol. 2, 1962, U.S. Code Cong. and Admr. News, p. 2787 provides, in part:

> "* * * As stated in the House report, the bill does not define the term 'agency', but the committee agrees that it should be taken to mean any department. * * * or bureau of the United States * * *."

To the argument that agents and officials of the United States cannot be sued in such a case, Dissenting Circuit Judge Coleman's answer is sufficient. (Slip opinion, p. 11. *infra*, App. A, p. A9).

> "If such agents or officials are acting in violation of Constitutional guaranties they cannot be legally acting for a government which must support and maintain that Constitution."

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT M. HELTON,
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FRANK GIBSON,
911 City National Bank Bldg.,
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Counsellors for Petitioners, Edward J. Simons and Lillie Simons, his wife, Helen Michna, a widow, Vernon Smith, Jr. and Frances Crane Smith, his wife, A.P. & C. Development Corporation, Patrick H. McBroom.

Of Counsel:
DONALD E. SHORT,
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Wichita Falls, Texas, 76301

SUPREME COURT OF THE UNITED STATES

No. 18, Original, October Term, 1922

No. 15, Original, October Term, 1923

STATE OF OKLAHOMA, Plaintiff,

v.

STATE OF TEXAS, Defendant,
(UNITED STATES, Intervener.)

ALTERNATIVE MOTION FOR LEAVE TO INTERVENE

Edward J. Simons and wife, Lillie Simons, Helen Michna, a widow, Vernon Smith, Jr. and Frances Crane Smith, his wife, A.P.&C. Development Corporation, and Patrick H. McBroom, of Wichita County, State of Texas, move the Court to grant them leave to intervene in the above styled and numbered cause to file their Ancillary Bill in Equity, the object of which is to pray this Honorable Court to enforce its decrees of boundary entered on March 12, 1923, 261 U.S. 340, and June 9, 1924, 265 U.S. 500, and to obtain such incidental and general relief as they justly show themselves entitled to.

Movants would show the Court that they are Texas riparian landowners of Wichita County, Texas. They own land which is bounded on the north by the Oklahoma-Texas boundary. Their lands comprise the Lucinda Meadows

Survey, Abstract No. 564, the B. F. Gillis Survey, Abstract No. 808 and the A. A. Durfee Survey, Abstract No. 556. The lands of the United States, the south-half of the channel of Red river, in Oklahoma, joins their land on the north.

Map No. 2, Sheet No. 1, of the Big Bend Area, dated December 31, 1923, of the file, also found in 44 S.Ct. 578, shows the area of movants' ownership. Their remote grantors owned this land on December 31, 1923. The above named surveys, not shown on this map, comprise the area between the Oklahoma-Texas boundary line and the F. W. Huseman, T.E. & L. Co., and the Elizabeth Stanley Surveys, which are shown.

Movants would show the Court that, as riparian landowners, they are bound by the boundary Treaty of 1819 and the decrees of boundary of this Court. Their land as a *res* is likewise bound.

As contemplated and provided for in the boundary decrees, an accretion has occurred to the south bank of Red River since the entry of the boundary decrees of this Court. It has accreted to your movants' riparian Texas land. The accretion was naturally and gradually caused and developed for the most part during the years 1935 to 1950.

The Department of Interior (the Hon. Stewart Udall, Secretary) holds and claims the accretion, claiming the same for the United States. The area comprising the accretion was in the river channel on December 31, 1923. Divers oil and gas lessees are in possession claiming under oil leases from the United States. Their oil leases are to lands in the channel of Red River, in Oklahoma. Their leases contain provision that they are subject to the decrees of boundary. They were executed pursuant to au-

thority of the Red River acts of Congress. An oil purchaser buys the production from these leases and pays the working interest share to the lessees and the royalty interest share to the United States.

Movants would show that by virtue of the boundary Treaty of 1819 and the boundary decrees of this Court that they are the rightful owners of the accretion and are entitled to the possession, use and enjoyment of the same.

Movants would show that as riparian owners of the accretion, their proprietary rights will be, in the future, subject to the law of alluvion, in accordance with the boundary decrees of this Court and conformable to the boundary decrees they offer to and will perform the boundary decrees in the future.

The movants respectfully show to the Court that the Department of Interior (the Hon. Stewart Udall, Secretary), the divers oil and gas lessees and the oil purchaser will not comply with the boundary Treaty of 1819 and the decrees of boundary of this Court.

The movants have filed concurrently with this Alternative Motion their Petition for a Writ of Certiorari to review a decision of the Honorable Court of Appeals for the Fifth Circuit, which affirmed an order of dismissal of the United States District Court for the Northern District of Texas, Wichita Falls Division. In that action your movants sought to enforce the boundary Treaty of 1819, and the boundary decrees of this Court. That action was dismissed for lack of jurisdiction.

This motion is made, in the alternative, to the Petition for a Writ of Certiorari.

Wherefore, in the alternative, movants pray for an order of this Court, granting movants leave to file an

Ancillary Bill in Equity, the object of which is to pray this Honorable Court to enforce its decrees of boundary entered on March 12, 1923, 261 U.S. 340 and June 9, 1924, 265 U.S. 500 wherein the relief sought will seek to compel the United States, the Department of Interior (the Hon. Stewart Udall, Secretary), the divers oil and gas lessees of the United States and the oil purchaser to perform and comply with the boundary Treaty of 1819 and the boundary decrees of this Court, and for such incidental and general relief as the movants justly show themselves entitled to have and receive, including costs.

ARGUMENT

Petitioners are not unmindful of this Court pronouncement in *Kentucky* v. *Indiana*, 281 U.S. at 277. Likewise we are not unmindful of rules announced in *Oklahoma* v. *Texas* in 256 U.S. at 605 and 258 U.S. at 581.

Private intervention in *Oklahoma* v. *Texas* was founded on "claims to property or funds of which a court has taken possession and control through a receiver or like officer * * *" 258 U.S. at 581.

Private parties were rejected as defendants in *Kentucky* v. *Indiana* because "the question which concerns" them was "only in common with all the citizens of his state". But the private party can be a defendant "to contest the propriety of the particular relief sought against him in case the decision on the merits is against his state" or "if the question * * * concerns him individually * * *."

Texas represented its citizens in *Oklahoma* v. *Texas* on questions concerning all its citizens, i.e. its political boundary, encompassing boundary to tax, boundary to vote and the like. It also represented each individual land-

owner, who was the assignee of the State of Texas under its public land laws. Relative to the land, then, the judgment in binding Texas bound its assignees the landowners. The judgment is personal to them and directly affects their land. The judgment operates *in personam* and *in rem.*

It is this *in rem* feature that distinguishes this request to intervene from those issues political in nature.

Root v. *Woolworth,* 150 U.S. 401, was a case that decided an assignee or grantee of a grantor could bring an ancillary bill to enforce a land decree, quieting title, obtained by the grantor sixteen years before. The original decree was styled *Morton* v. *Root.* Morton sold the land to Woolworth. Root violated the original decree by going back into possession. There was diversity between Morton and Root, but no diversity between Woolworth and Root. This court ruled that the jurisdiction was ancillary in character. This court said:

> "Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution." (p. 412).

Gunter v. *Atlantic Coast Line R. Co.,* 200 U.S. 273 involved enforcement of the decree rendered in *Humphrey* v. *Pegues,* 16 Wall. 244. In *Gunter,* South Carolina contended it was immune to suit. But South Carolina was a party to *Humphrey.* This Court held that since the suit was ancillary the suit was a continuation of the original case, and South Carolina was therefore already before the Court.

The United States, as was South Carolina, is already before the Court and cannot claim the defense of sovereign immunity to suit.

CONCLUSION

If there be constitutional invasion of movants' rights, it is submitted that this Court has the option to decide which Court of the federal system this Court's boundary decree is to be enforced in.

Petitioners would suggest that if this Court's decree was the decree of a District Court the question of sovereign immunity to suit could not have arisen in the Trial Court because it could have been transferred under the registration of judgments act. Ironically, then, a District Court's judgment is more versatile than the judgment of this, our highest Court.

In the alternative and for the foregoing reasons this motion should be granted.

Respectfully submitted,

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Counsellors for Movants, Edward J. Simons and Lillie Simons, his wife, Helen Michna, a widow, Vernon Smith, Jr., and Frances Crane Smith, his wife, A. P. & C. Development Corporation, Patrick H. McBroom.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24824

EDWARD J. SIMONS, ET AL.,

Appellants,

versus

JERRY VINSON and A. P. CLARK, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(May 3, 1968.)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

AINSWORTH, Circuit Judge: Plaintiffs appeal from the dismissal of their complaint for lack of jurisdiction. The District Court found specifically:

"(1) The named defendants, Bureau of Land Management, Bureau of Indian Affairs and Department of the Interior are not legal entities or juridical persons which are capable of being sued.

"(2) The cause of action as to all named defendants is in essence a suit to quiet title to and obtain possession of land held and administered as public land by the United States and, hence, is a suit against the United States.

"(3) The United States is an indispensable party to this action, has not consented to be sued, and the suit must be dismissed as to all parties."

We agree with the District Court and affirm.

Appellants, Texas riparian landowners, filed this complaint against (1) United States Department of Interior and its Bureau of Land Management and Bureau of Indian Affairs (referred to herein as Lessors);[1] (2) various named lessees of these Lessors (referred to herein as Lessees); and (3) Bell Oil and Gas Company, a pipeline company and purchaser of oil from Lessees (referred to herein as Oil Purchaser).

The complaint asserted ownership to certain alleged accreted land, approximately 999.95 acres in area, adjacent to and south of the Red River (which river forms the interstate boundary line between Texas and Oklahoma) on which Lessors have granted various leases to Lessees, and from which Lessees have sold oil to Oil Purchaser. Plaintiffs prayed for an injunction against all defendants from

1. The District Court denied appellants' motion for leave to file an amended complaint, filed subsequent to dismissal of the suit, by which an attempt was made to name the individual heads of these agencies, and an alternative remedy of mandamus was sought against Lessors to compel them to assist in "boundary location and recognition thereof, present and future, in accordance with the decrees of the U. S. Supreme Court." In denying the motion, the District Court noted that there were "no allegations which would alter the result" of the prior judgment.

interfering with their alleged title to the disputed land, a quitclaim to the land from Lessors, damages and an accounting from Oil Purchaser, and damages from Lessees as well as termination of Lessees' claim, title and possession of oil and gas rights.

Appellants and the United States are adjoining landowners—appellants to the south and the United States to the north. The Oklahoma-Texas boundary line has been determined by the United States Supreme Court to be the south bank of the Red River subject to changes wrought by erosion and accretion.[2] Appellants contend that they and the United States are possessed of shifting ownership to the land by virtue of their common boundary line being a shifting boundary, and that the disputed land is at present owned by appellants.

Appellants do not dispute that the United States owns the south half of the Red River channel and the Oklahoma land that borders the boundary on the north; that the river channel itself is in the State of Oklahoma; that parts of the north half of the channel are owned by Indian wards and held by the United States as Trustee of the Heirs of Ray Doyah; and that as of December 31, 1923, as a result of the United States Supreme Court decisions in *State of Oklahoma* v. *State of Texas*,[3] title and possession of the disputed land was vested in the United States. Appellants do contend, however, that certain accretion to the south bank of Red River which occurred subsequent to the *State of Oklahoma* v. *State of Texas* decisions is, and has been since 1950, out of and south of the

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2. *State of Oklahoma* v. *State of Texas*, 256 U. S. 602, 41 S. Ct. 621, 622 (1920); 259 U. S. 565, 42 S. Ct. 594 (1922); 260 U. S. 606, 43 S. Ct. 221 (1923); 261 U. S. 340, 43 S. Ct. 376 (1923); 261 U. S. 345, 43 S. Ct. 377 (1923); 265 U. S. 493, 44 S. Ct. 571 (1924); 265 U. S. 500, 44 S. Ct. 573 (1924).

3. Note 2, supra.

river channel, thus becoming a part of the State of Texas. It is this accretion to the south bank of the river which is the disputed area and which appellants claim.

Following the Supreme Court decisions in *State of Oklahoma* v. *State of Texas, supra,* Congress authorized the Secretary of Interior to make oil leases on "lands and oil and gas deposits belonging to the United States and situated south of the medial line of the main channel of Red River, Oklahoma" (30 U.S.C. §§ 230-236), on "public lands in that part of the Red River between the medial line and the south bank of the river, in Oklahoma" (43 U.S.C. § 209) and on Indian land (25 U.S.C. § 396). Pursuant to this legislation various oil and gas leases, which are the subject of this suit, were executed and renewed between 1925 and 1956. Lessees are in possession of the disputed land, which is producing oil, and the royalty from the leases is being paid to the United States.

Appellants' claim to the area is based on the Supreme Court decisions in *State of Oklahoma* v. *State of Texas,*[4] and on language in the leases that the "area of the lease may be diminished by reason of a shift to north-

4. Note 2, supra. The Partial Decree in *State of Oklahoma* v. *State of Texas,* 261 U. S. 340, 341, 43 S. Ct. 376 (1923), provides in pertinent part:

"It is ordered, adjudged and decreed:

"1. The boundary between the states of Oklahoma and Texas, . . . is part of the international boundary established by the treaty of 1819 between the United States and Spain, and is on and along the south bank of that river [Red River] as the same existed in 1821, when the treaty became effective, save as hereinafter stated.

"2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change. . . .

. . . .

"4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future."

ward of the Texas-Oklahoma Line, due to erosion or accretion and that in case of such shift to the southward, the area of this lease will not be enlarged," and that the area of the leased land is "subject to variation arising from changes in the position of the medial line and of the South bank of the said Red River since December 31, 1923." Appellants contend that the parties to the leases are prevented by the language of the leases and the Supreme Court boundary decrees from claiming sovereign rights to Texas land.

Probably no principle of law is better established than that the United States may not be sued without its consent. *Louisiana* v. *McAdoo,* 234 U.S. 627, 34 S. Ct. 938 (1914).[5] Appellants' proffered amendment to their complaint is an unsophisticated attempt to avoid the defense of governmental immunity by naming as defendants the officers of the particular government agencies and alleging that these officers acted beyond their authority. The immunity of the sovereign, however, extends to its agencies, the Department of the Interior and the Bureau of Land Management and Indian Affairs, and the officers of these agencies.[6] Generally, the relief sought nominally against an officer is against the sovereign if the decree would operate against the sovereign. *State of Hawaii* v. *Gordon,* 373 U.S. 57, 83 S. Ct. 1052 (1963).[7] And it is well settled that "When Congress authorizes one of its

5. See also *Dugan* v. *Rank,* 372 U. S. 609, 83 S. Ct. 999 (1963); *Malone* v. *Bowdoin,* 369 U. S. 643, 82 S. Ct. 980 (1962); *Larson* v. *Domestic & Foreign Commerce Corporation,* 337 U. S. 682, 69 S. Ct. 1457 (1949).

6. See *Ward* v. *Humble Oil & Refining Co.,* 5 Cir., 1963, 321 F. 2d 775; *Chournos* v. *United States,* 10 Cir., 1964, 335 F. 2d 918. The Bureau of Land Management and the Bureau of Indian Affairs are agencies of the Department of the Interior. See 43 U.S.C. § 1; 25 U.S.C. § 1, respectively.

7. In accord, authorities cited in Note 5, supra.

agencies to be sued *eo nomine*, it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity. *Blackmar* v. *Guerre*, 342 U.S. 512, 515, 72 S. Ct. 410, 412 (1952). The fact that the United States was not named as a defendant does not determine whether it is actually a party to the suit, for it has long been the law that to make such a determination it is necessary to look to the effect of the judgment that may be rendered. *Louisiana* v. *McAdoo, supra.* For, as stated in *Dugan* v. *Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 1006 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U. S. 731, 738, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"

The only two exceptions to this general rule are: "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." *Dugan* v. *Rank*, 372 U.S. at 621, 622, 83 S. Ct. at 1007.[8]

The relief sought here would require a judgment which would be within the general rule of *Dugan* v. *Rank*. Appellants seek to obtain quitclaim deeds to the disputed land from Lessors, the federal appellees, and an injunction against these appellees "from interfering with plaintiffs' title and possession in the future." Thus the District Court was asked both to compel and to restrain actions

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8. In accord, *Malone* v. *Bowdoin*, supra. The general rule and its two exceptions were recently reiterated by this Court in *M. Gardner* v. *R. Harris*, 5 Cir., 1968, ... F.2d ..... (No. 24485, dated March 26, 1968).

of the government. The effect of any judgment granting such relief would of necessity operate against the government. Hence, the suit is unquestionably against the United States. The corollary is clear—the United States is an indispensable party to such an action. Inasmuch as it has not consented to be sued, the Court lacks jurisdiction to maintain the suit unless appellants can show that it is within one of the exceptions to the *Dugan* v. *Rank* general rule. Appellants must show either that the statutes are void under which Congress authorized the Secretary of Interior to lease the disputed land, or that the Secretary or his agents acted beyond the scope of their statutory authority. Appellants attempt to show that appellee Lessors, by leasing oil and gas rights to the disputed land, have acted ultra vires their authority.[9] However, this circuitous argument is based on appellants' assumption that the land in question belongs to appellants and not to the United States. Appellants contend that a decision by the District Court on the merits would

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9. Plaintiffs contend that they are entitled to two, admittedly inconsistent but allegedly correct, remedies: (1) at law, to which the United States *is not* an indispensable party and (2) in equity, to which the United States *is* an indispensable party but to which suit the United States has consented by common law. They characterize their suit as a boundary dispute to enforce the Boundary Treaty of 1819 between the United States and Spain and to enforce the Supreme Court decrees in *United States* v. *State of Texas*, 143 U. S. 621, 12 S. Ct. 488 (1892), final decree in 162 U. S. 1, 16 S. Ct. 725 (1896), and the various decisions in *State of Oklahoma* v. *State of Texas* (note 2, supra). Appellants contend that they are entitled to relief against Lessees in possession and against the officials of Lessors who support such possession. The argument that the United States is not an indispensable party is based on appellants' theory that the remedies claimed by them would require only the performance of ministerial duties as distinguished from sovereign duties; that defendants' breach of these duties (by ignoring the Boundary Treaty and the decrees) is ultra vires, and hence the suit is not in essence against the United States and consent is unnecessary. On the other hand, appellants argue that the United States has consented to be sued inasmuch as it had consented to enforcement of the boundary decrees by becoming plaintiff and intervenor, respectively, in *United States* v. *State of Texas*, supra, and *State of Oklahoma* v. *State of Texas*, supra.

prove their ownership. Appellants in "bootstrap" fashion would have the Court assume the very fact they desire to prove. However, in order to so prove appellants must necessarily sue the United States. Our original principle that absent its consent the United States may not be sued forecloses such a suit. Dismissal, therefore, was proper.[10]

AFFIRMED.

COLEMAN, Circuit Judge Dissenting:

The Constitution, Amendment V, mandatorily commands that no person shall be deprived of property without due process of law.

Assuming the allegations of the complaint to be true, as we must do in passing on the validity of a dismissal for want of jurisdiction, I must respectfully dissent.

I agree that the United States cannot be sued to compel the execution of a quitclaim deed, but that does not reach the heart of this litigation nor is it indispensable to the vindication of rights asserted by these appellants. Baldly stated, I do not believe that the doctrine of sovereign immunity should be superior to or permitted to nullify a mandatory command of the Constitution. It is not entitled to that kind of judicial sanctity.

The ably and concisely written majority opinion accurately recites the history of the litigation. It freely concedes that the boundary in issue was determined by a treaty, which is the supreme Law of the Land. The Supreme Court, after extensive litigation, to which the government was a party, has adjudicated and decreed that this boundary follows accretion. Appellants say that this accretion has taken place.

10. This does not mean, however, that appellants may not assert any legal claim which they may have for money damages against the government, e.g. under the Tucker Act, 28 U.S.C. § 1346 (a)(2).

The defendants, however, by the invocation of sovereign immunity on behalf of *one of the parties involved,* propose to keep land which is not theirs. They propose to do it without allowing appellants a day in Court. Thus, in my opinion, the treaty, the Supreme Court decrees, and the Constitution itself are rendered impotent.

The constitutional command is higher than the doctrine of sovereign immunity. Indeed, at the very least it is, or should be, a positive waiver of the doctrine in such cases. Even in the absence of waiver, I would hold that the doctrine cannot be used to defeat Constitutional guaranties.

I would, therefore, further hold that the United States Courts are open for the purpose of allowing these appellants an opportunity to prove their ownership. If they cannot, that ends the matter. I would not permit either the government, or those private parties who seek to hide behind its skirts, to benefit from the application of the doctrine in frustration of the Constitution.

Nor do I have any sympathy for the argument that agents and officials of the United States cannot be sued in such a case. If such agents or officials are acting in violation of Constitutional guaranties they cannot be legally acting for a government which must support and maintain that Constitution.

The majority says appellants may have a right of action for damages under the Tucker Act. The Constitution commands that they shall have the property.

I respectfully dissent

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24824

EDWARD J. SIMONS, ET AL.,

Appellants,

versus

JERRY VINSON and A. P. CLARK, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(June 17, 1968.)

On Petition for Rehearing

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM: To correct an inadvertent error, we direct a deletion of the last sentence of the first paragraph appearing on page 3 of the slip opinion, which reads as follows:

"Plaintiffs prayed for an injunction against all defendants from interfering with their alleged title to the disputed land, a quitclaim to the land from Lessors, damages and an accounting from Oil Purchaser, and damages from Lessees as well as cancellation of oil and gas leasehold rights converted by Lessees to Oil Purchaser."

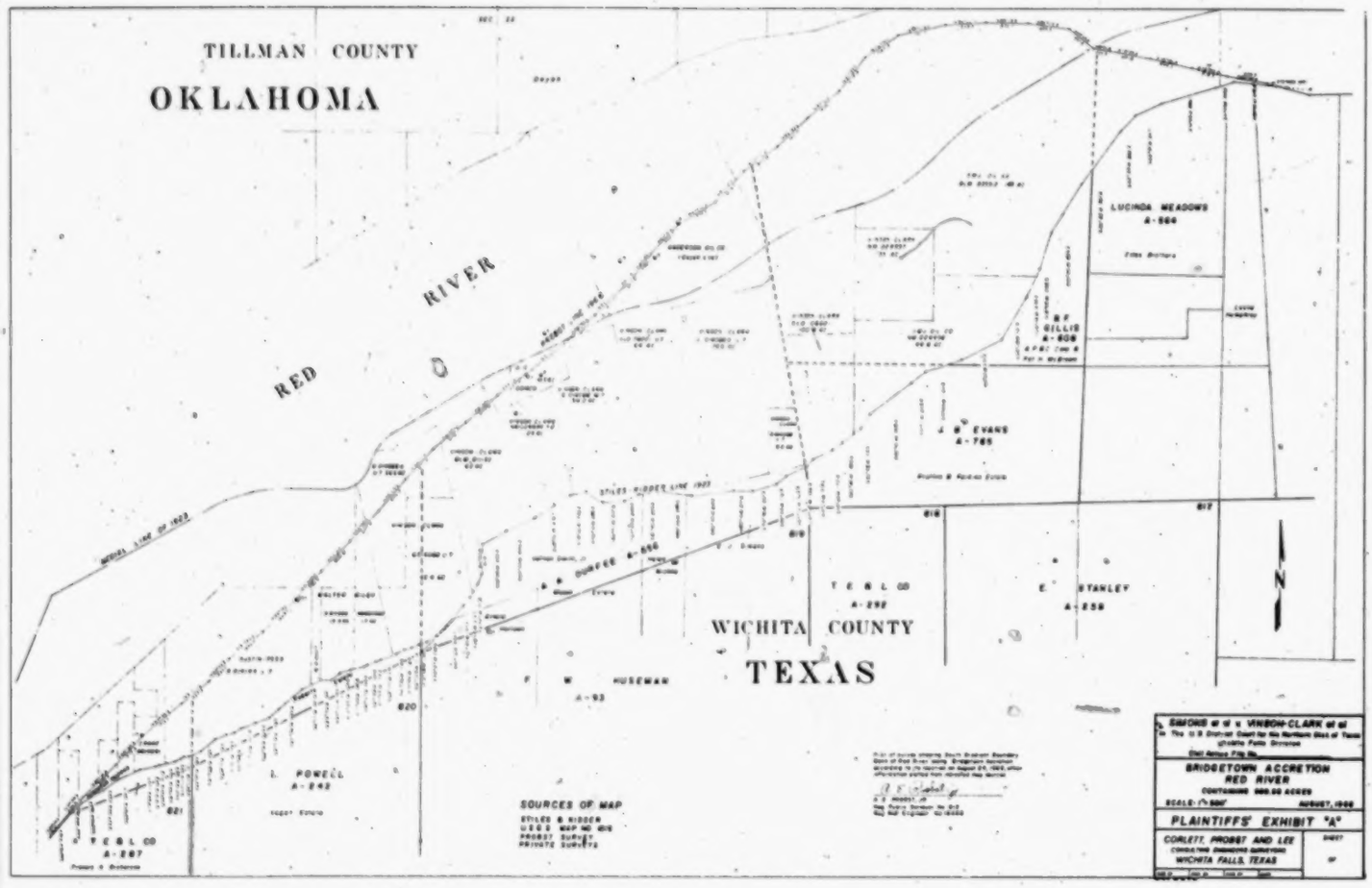
In lieu thereof the following sentence should be substituted:

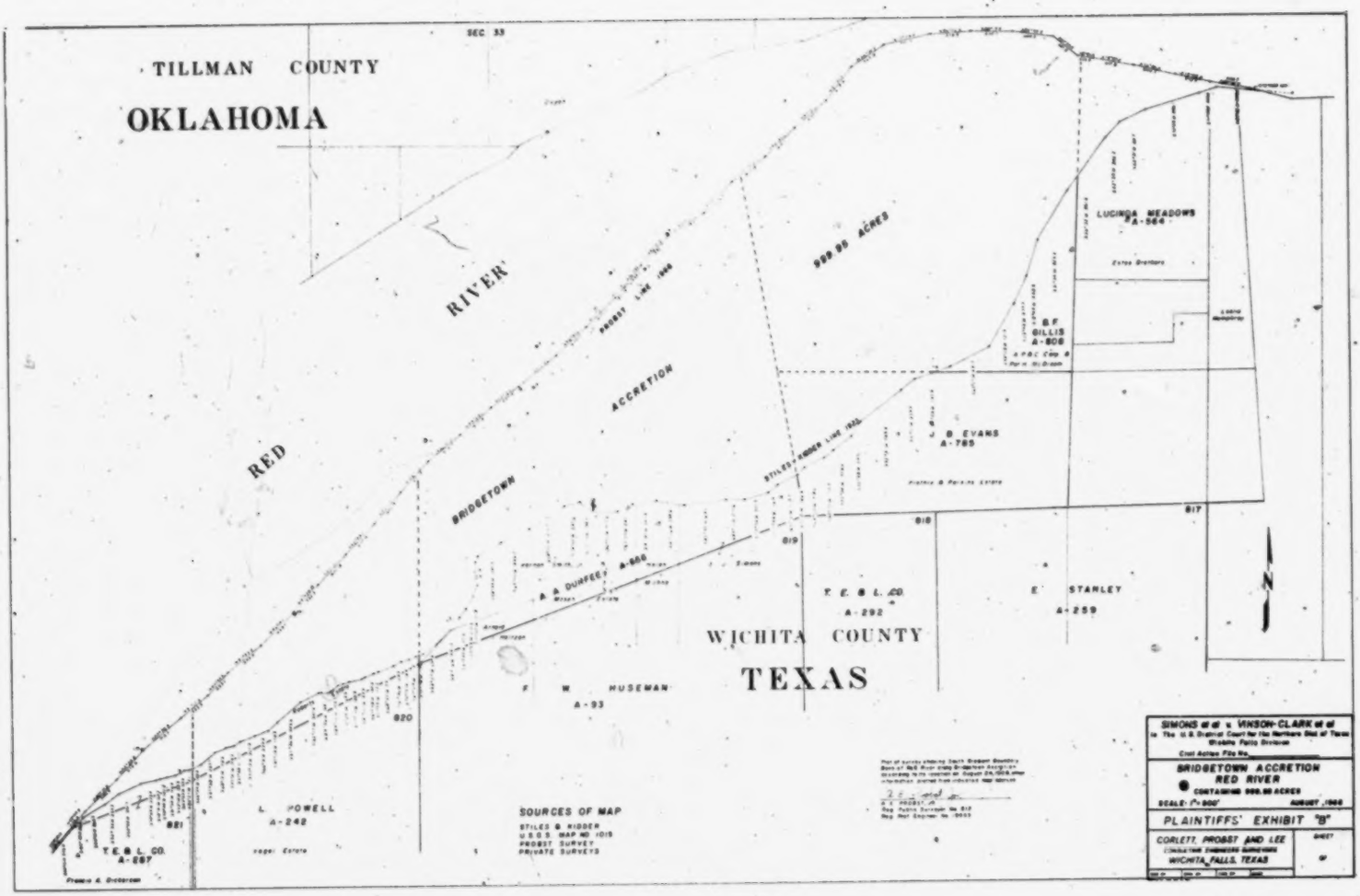
"Plaintiffs prayed for an injunction against all defendants from interfering with their alleged title to the disputed land, a quitclaim to the land from Lessors, damages and an accounting from Oil Purchaser, and damages from Lessees as well as termination of Lessees' claim, title and possession of oil and gas rights."

IT IS ORDERED that appellants' petition for rehearing in all other respects be DENIED.

APPENDIX C

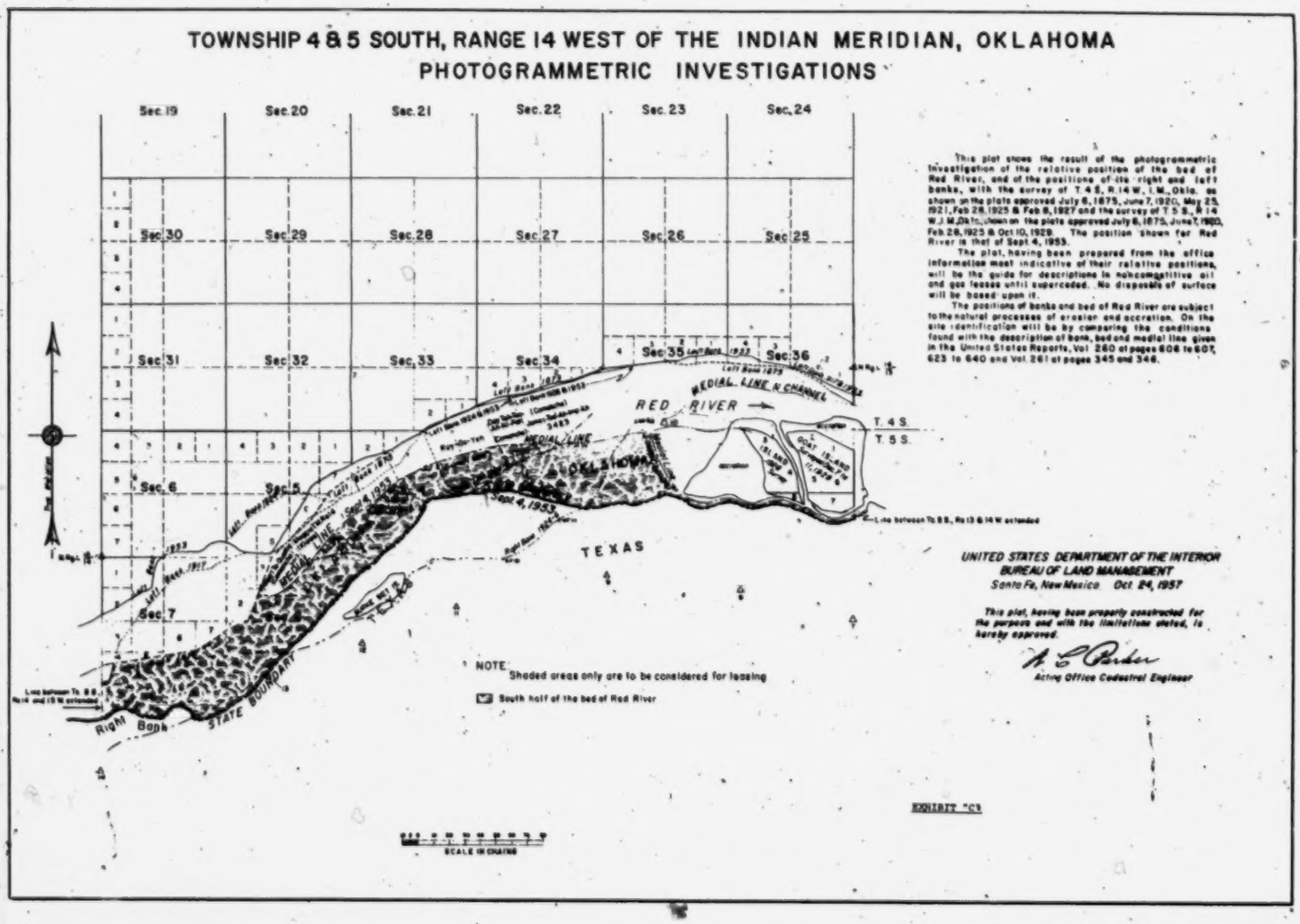
PLAINTIFF'S EXHIBIT A





PLAINTIFF'S EXHIBIT B

A14


TOWNSHIP 4 & 5 SOUTH, RANGE 14 WEST OF THE INDIAN MERIDIAN, OKLAHOMA
PHOTOGRAMMETRIC INVESTIGATIONS
Sec. 19
Sec. 20
Sec. 21
Sec. 22
Sec. 23
Sec. 24
Sec. 30
Sec. 29
Sec. 28
Sec. 27
Sec. 26
Sec. 25
Sec. 31
Sec. 32
Sec. 33
Sec. 34
Sec. 35
Sec. 36
Sec. 6
Sec. 5
Sec. 7
RED RIVER
MEDIAL LINE N CHANNEL
MEDIAL LINE
OKLAHOMA
TEXAS
GOAT ISLAND
T. 4 S.
T. 5 S.
Sept 4, 1953
STATE BOUNDARY
Right Bank
This plot shows the result of the photogrammetric investigation of the relative position of the bed of Red River, and of the positions of its right and left banks, with the survey of T 4 S., R 14 W., I. M., Okla. as shown on the plats approved July 6, 1875, June 7, 1920, May 25, 1921, Feb 28, 1925 & Feb 8, 1927 and the survey of T 5 S., R 14 W., I. M., Okla., shown on the plats approved July 6, 1875, June 7, 1920, Feb 28, 1925 & Oct 10, 1929. The position shown for Red River is that of Sept 4, 1953.
The plat, having been prepared from the office information most indicative of their relative positions, will be the guide for descriptions in noncompetitive oil and gas leases until superceded. No disposals of surface will be based upon it.
The positions of banks and bed of Red River are subject to the natural processes of erosion and accretion. On the site identification will be by comparing the conditions found with the description of bank, bed and medial line given in the United States Reports, Vol 260 at pages 606 to 607, 623 to 640 and Vol 261 at pages 345 and 346.
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Santa Fe, New Mexico Oct 24, 1957
This plat, having been properly constructed for the purpose and with the limitations stated, is hereby approved.
Acting Office Cadastral Engineer
NOTE Shaded areas only are to be considered for leasing
South half of the bed of Red River
EXHIBIT "C"
SCALE IN CHAINS

PLAINTIFF'S EXHIBIT C

A15

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OCT 8 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 511

EDWARD J. SIMONS, et al.,
Petitioners,

vs.

JERRY VINSON and A. P CLARK, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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Respondents in this case are lessees operating oil wells in the channel of the Red River under leases from the

United States of America and an oil purchaser (Bell Oil and Gas Company) which has purchased crude oil produced by the lessees and has paid the United States of America and the lessees for such oil. The underlying dispute is whether the lands on which the wells are located are owned by the United States of America or by petitioners.

The Complaint named certain federal agencies charged by law with the management of federally owned lands in the area of the leases (Bureau of Land Management, Bureau of Indian Affairs and Department of the Interior). Petitioners sought, inter alia, to enjoin the federal officials and agencies from issuing further leases on the lands in controversy, asserted ownership of the lands and asked for an injunction to enjoin all defendants from interfering with the alleged title of the petitioners to such lands. Petitioners further sought damages from the lessees and an accounting from the oil purchaser which would require it to account to them for all of the oil it has purchased (and paid for in good faith) from the lessees and the United States of America.

Petitioners recognized at the outset that they were confronted with the fundamental rule that an action to recover possession of land held by a tenant and an accounting for minerals severed by the tenant during his lease cannot be maintained against the tenant unless the landlord is joined as a party. Otherwise, a tenant is put to the burden of proving his landlord's title in an action where the decision might bind the tenant and not the landlord.

Petitioners also recognized the accepted rule that the United States of America cannot be sued without its consent and they realized that the United States had not consented to be sued in the type of action they proposed to file.

Faced with these problems, petitioners contrived the ingenious, but thin, artifice of attempting to join the United States Department of Interior and its Bureau of Land Management and Bureau of Indian Affairs as defendants.

Both the District Court and the Court of Appeals recognized the artifice as "an unsophisticated attempt to avoid the defense of governmental immunity by naming as defendants the officers of the particular government agencies and alleging that these officers acted beyond their authority."

The device is unsophisticated because it will not bear even a cursory scrutiny. The fundamental issue in this case is the *title* to the lands involved. Title and ownership are either vested in the United States of America, as a sovereign, or in petitioners (or other owners) but not in the Department of Interior, Bureau of Land Management or Bureau of Indian Affairs. These agencies have been vested by statutes of the United States with certain supervisory functions over the lands; but Congress may, at any time, delegate such authority to other officers and agencies.

If the title dispute were between petitioners and Standard Oil Company or any other corporate owner, no court would consider it adequate to make the President or any other officer of the corporation a defendant, in lieu of the corporate owner. The attempt to litigate title to the lands of the United States by suing only subordinate agencies of the government is no less bizarre.

This Court has recognized the rule that ". . . under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." *Leiter Minerals, Inc.*

v. *United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). Petitioners' attempt to circumvent the rule by joining federal agencies cannot be countenanced. This Court has recognized that suits to enjoin federal officers from administering property of the United States is a suit against the United States, *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), and that the character of the relief sought, not the denomination of the parties, determines whether a suit is a suit against the United States. In the instant case it is clear that petitioners are seeking to establish effective title and ownership of the lands in controversy and this dispute is between the United States itself and petitioners.

Petitioners' reliance upon *United States* v. *Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), and its sequel, *Land* v. *Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947), is inappropriate. In *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962), this Court recognized that those cases were part of a series of apparently conflicting decisions and that it had in the *Larson* case, *supra*, resolved "the conflict in doctrine" and "made an informed and carefully considered choice between the seemingly conflicting precedents." *Malone* and *Larson*, *supra*, have adequately established the general doctrine applicable to cases like the present and there is no compelling reason why the time and energies of this Court should be consumed to deal with each little innovation counsel may from time to time contrive to evade or avoid the impact of the rulings in those cases. The case presents no questions of general importance sufficient for review on certiorari, the lands involved are not extensive and none of the sovereign parties involved have deemed this small

controversy significant enough to warrant action on their part. For these reasons, the Petition for a Writ of Certiorari should be denied.

Little need be said with respect to the alternative Motion For Leave To Intervene in No. 18 Original, October Term, 1922, and in No. 15 Original, October Term, 1923, involving controversies among the United States and the States of Texas and Oklahoma. This is an attempt by private citizens to reopen an old controversy among sovereigns which they have not sought to reopen. There is no fund in the custody of an officer of this Court to which movants are asserting a claim and while the decrees in those cases did establish boundaries which are determinative of title the Court surely did not intend that the Original jurisdiction invoked in those cases should provide a perpetual vehicle in which private citizens might litigate forever the daily course of the Red River.

The Court's Original jurisdiction is a limited jurisdiction, and "manifestly intended to be sparingly exercised", *State of California* v. *Southern Pac. Co.*, 157 U.S. 229, 261, 15 S.Ct. 591, 604, 39 L.Ed. 683, 695 (1895), and this rule should clearly be observed where the effect of granting the Alternative Motion would be to saddle this Court with a controversy involving private citizens of two States where neither State has sought relief.

The attempt to disguise the character of the relief sought by the Alternative Motion as "ancillary relief" does not surmount the bar of the immunity of the United States to suit as its sovereign immunity extends to suits of every class and is not dependent upon whether the suit is an original suit or a suit for ancillary relief, *Illinois Central*

Railroad v. Public Utilities Comm., 245 U.S. 493, 38 S.Ct. 170, 62 L.Ed. 425 (1918).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 511

EDWARD J. SIMONS, ET AL., PETITIONERS

v.

JERRY VINSON and A. P. CLARK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND, IN THE ALTERNATIVE, MOTION FOR LEAVE TO INTERVENE IN OKLAHOMA v. TEXAS

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 394 F.2d 732 (App. 1-9).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1968. Except for a clerical correction, the court denied a petition for rehearing on June 17,

1968 (App. 10-11). The jurisdiction of this Court is based upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit brought by private parties against various departments and officials of the federal government to adjudicate title to property with the United States was correctly dismissed on the ground that the United States had not consented to such suit.

2. Whether this Court should re-open the case of *Oklahoma* v. *Texas*, 252 U.S. 372, to allow private parties to intervene, on the basis of an allegation that the United States is not honoring the decree in that case.

STATEMENT

In September 1966 petitioners brought suit against the Department of the Interior, the Bureau of Land Management, and the Bureau of Indian Affairs to enjoin them from issuing oil and gas leases on certain property and to compel execution of quitclaim deeds to that property.[1] Petitioners, who are riparian

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[1] By proposed amendment—which the district court said would not affect the disposition of the case—they attempted to name as defendants Stewart L. Udall, Secretary of the Interior; Boyd L. Rasmussen, Director of the Bureau of Land Management; and Robert L. Bennett, Commissioner of Indian Affairs. The federal departments and officials are herein referred to as federal respondents. The original complaint also named as defendants lessees of the land in question and a purchaser of oil from them.

landowners on the south bank of the Red River in Wichita County, Texas, claimed they had acquired title to some 1,000 acres by accretions occurring between 1935 and 1950. Portions of this property were in possession of lessees of the United States under oil and gas leases issued between 1925 and 1956 in accordance with the Act of March 3, 1909, 35 Stat. 783, as amended, 25 U.S.C. 396; and the Act of March 4, 1923, 42 Stat. 1448, 30 U.S.C. 230-236, replaced by Sections 1 and 2 of the Act of June 22, 1948, 62 Stat. 576, 43 U.S.C. 209-210.[2]

The district court dismissed petitioners' action against the federal respondents on the ground that it was an unconsented suit against the United States. The court of appeals affirmed, one judge dissenting.[3]

ARGUMENT

1. The decision of the court of appeals is in accord with the decisions of this Court. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57. In *Larson* and

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[2] Part of the land is held in trust by the United States for the heirs of Ray Doyah, an Indian allottee. Such trust land was under an oil and gas lease approved by the Bureau of Indian Affairs.

[3] Following in part the suggestion of the court (App. 8, fn. 10), petitioners have instituted a suit against the United States and the federal officials for monetary relief. The suit was dismissed on jurisdictional grounds by the district court, and an appeal was taken and is now pending in the Fifth Circuit (No. 25945).

Malone, suits were brought against federal officials for relief with regard to property claimed by the plaintiffs. This Court held that where the relief sought would reach property of the United States it was immaterial that the United States was not named as a defendant. The Court, therefore, ruled that the complaints should be dismissed because the United States had not consented to such suits. Likewise, here the petitioners clearly seek to contest title with the United States, not with the Secretary of the Interior, Director of the Bureau of Land Management, or the Commissioner of Indian Affairs in their individual capacities. These federal officials neither claim title in themselves nor occupy the land in their individual capacities.

To avoid dismissal, petitioners assert that their allegations, which they claim must be accepted as true, show that the individual officials are acting illegally and thus they are not immune from suit (Pet. 11). However, a similar argument was rejected in *Larson* v. *Domestic & Foreign Corp.*, *supra* (at 692-693):

> We believe the theory to be erroneous. It confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action. It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. * * * But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the

> sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

See also, *Malone* v. *Bowdoin*, *supra*.

2. Nor is there merit to the suggestion that the Court reopen the case of *Oklahoma* v. *Texas*, 252 U.S. 372, to allow petitioners to intervene in that action to seek enforcement of the decree. Assuming that the Court might properly reopen such a case within its original jurisdiction at the instance of private persons, not parties to the suit, there is no reason to take such action here. The Court has consistently recognized that its original jurisdiction is not mandatory. See *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 464-465, and cases cited therein. This case presents no special facts warranting the exercise of the Court's discretionary jurisdiction. *Oklahoma* v. *Texas* involved a significant question concerning the boundary between those two states, which was also of major concern to the United States. While petitioners allege that the boundary in question has significantly shifted by accretion since the Court's decree, neither the two states involved nor the United States has sought any further decree from the Court. And the present controversy does not involve a dispute as to the meaning of this Court's

decree—both parties recognize that Texas riparian landowners are entitled to the benefits of accretion. The only question in conflict is whether an accretion has taken place.

Finally, it should be noted that denial of leave to intervene will not deny petitioners a hearing on their claim. As noted above, see note 3 *supra*, petitioners presently have an appeal pending in the Fifth Circuit on the question whether their claim comes within the Federal Tort Claims Act. Even if they are unsuccessful on that appeal, they may still bring an action in the Court of Claims. See *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n. 8.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to intervene in *Oklahoma* v. *Texas*, 252 U.S. 372, should be denied.

Respectfully submitted.

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OCTOBER 1968.

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SUPREME COURT OF THE UNITED STATES

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REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

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ARGUMENT

The Admissions of the Federal Respondents Show This Case Seeks No Contest of Title with the United States.

Beginning with the last sentence, page 5, federal respondents' brief, we quote:

"And the present controversy does not involve a dispute as to the meaning of this Court's decree—both parties recognize that Texas riparian landowners are entitled to the benefits of accretion. The only question in conflict is whether an accretion has taken place."

1. This position freely admits that title to an accretion is not in dispute. It is admitted to belong to Texas riparian landowners. Therefore, clearly there is no contest of title between the petitioners and the United States.

2. The "sovereign immunity" asserted by the federal respondents is an immunity to be freed from the "conflict" of "whether an accretion has taken place." That they have no such freedom from contest is demonstrated by the fact that such freedom from contest would permit them to violate federal law—the Red River Acts, the Boundary Treaty and the Decrees of this Court. They propose to halt even the United States Constitution, because, if there be an accretion, refusal to obey these federal laws constitutes a confiscation of the petitioners' property without just compensation. Petitioners cannot obtain compensation in the Court of Claims or any other special court simply because no implied contract can arise from seizure unwarranted and unauthorized by any federal law.

The argument that the federal respondents have been immunized from the "conflict" of "whether an accretion has taken place" is answered and refuted by the case of *Philadelphia Co.* v. *Stimson*, 223 U.S. 605. Moreover, the decision of the Court of Appeals is contrary to *Stimson*. In *Stimson*, this Court held that the Secretary of War could not invoke sovereign immunity to prevent the plaintiff from showing a water boundary had not changed because the changed water line was caused by *avulsion*. If the change had been caused by avulsion the boundary had not changed.

The Secretary's action would have been in violation of federal law and ultra vires. The Court said that even if there was presented a title question the dominant question was one of the Secretary's authority and he could not use sovereign immunity to prevent plaintiff from showing the *fact* which would have made his action ultra vires. The *Larson* court approved of this decision. By footnote, it quoted the crucial sentence, viz:

> "While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still if its title to the lands under water were established or admitted to be as alleged, the question would remain whether the defendant in imposing restrictions upon the use of the property was acting by virtue of authority validly conferred by a general act of Congress. This was the principal question which the complainant sought to have determined." [Footnote 23, 337 U.S. 700, *Larson* case.]

3. This case is a suit to halt the respondents' continued violation of the boundary Treaty and boundary decrees, which until restrained, is also a violation of the Fifth Amendment of the United States Constitution.

CONCLUSION

The Courts below have done violence to the decrees of this Court. In so doing the Constitution of the United States has been breached. Manifest reason is shown why this Court should grant certiorari. This Court must protect its own decrees and protect the Constitutional right of the citizen to have his constitutionally guaranteed day in Court to halt violation of federal law.

Jurisdiction is the judicial exercise of power to determine jurisdiction.

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